SUPREME COURT, U. S.
OCT 7 1974
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(112-E)

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-3901

ABE LAVINE, Individually, and as Commissioner of Social Services for the State of New York,
Petitioner,

vs.

BERNICE BOINES, by MILDRED GAINES, her Mother and Natural Guardian,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH JUDICIAL DEPARTMENT.

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No. .....

ABE LAVINE, Individually, and as Commissioner of Social Services for the State of New York,
Petitioner,

vs.

BERNICE BOINES, by MILDRED GAINES her Mother and Natural Guardian,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH JUDICIAL DEPARTMENT.

The Present Petition

The Commissioner of the New York State Department of Social Services, hereinafter called "Petitioner", prays that a writ of certiorari issue to review the decision and order of the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, dated April 11, 1974, and entered in the office of the Clerk of that Court on the same day.

Opinions Below

The opinion of the Appellate Division, Fourth Judicial Department, is officially reported in 44 New York A D 2d 765. A copy of said opinion is set forth as Appendix A to this petition.

The decision of the New York State Supreme Court, County of Monroe, is reported in 71 New York Misc 2d 259. A copy of that decision is set forth as Appendix B to this petition. A copy of the decision of the Petitioner dated March 13, 1972, is set forth as Appendix C to this petition.

By notice of motion dated May 30, 1974, Petitioner moved in the Court of Appeals of the State of New York pursuant to the provisions of section 5602(a)(1)(i) of the New York Civil Practice Law and Rules for permission to appeal to that Court from the order of the Appellate Division, Fourth Department. Petitioner's motion was denied by the New York Court of Appeals, without opinion, by order dated July 11, 1974 (34 N Y 2d 519).

Jurisdiction

The order of the Court of Appeals of the State of New York denying leave to appeal from the order of the Appellate Division, Fourth Department, was entered July 11, 1974. This petition for certiorari is being filed within ninety (90) days of that date. In view of the denial by the New York Court of Appeals of Petitioner's motion for leave to appeal, the order of the Appellate Division constituted the final judgment rendered by the highest court of New York in which a decision could be had, within the meaning of 28 U.S.C., § 1257. A copy of the order of the Appellate Division is attached as Appendix D to this petition. The statutory provision which, it is submitted, confers jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C., § 1257(3).

Question Presented

Does the policy of the New York State Department of Social Services of granting a pregnancy allowance from the fourth month of pregnancy which has been medically verified, to pregnant women lacking resources to meet any additional needs which may arise as a result of the pregnancy, while denying such an allowance to pregnant women whose needs are being fully supplied by legally responsible relatives, constitute a denial of equal protection?

Constitutional and Statutory Provisions and Regulations Involved

THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

"Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE SOCIAL SERVICES LAW

(McKinney's Consolidated Laws of New York, Book 52-a)

"§ 34. General powers and duties of the commissioner

"3. The commissioner shall

* * *

"(e) enforce this chapter and the regulations of the department within the state and in the local governmental units;

"(f) establish regulations for administration of public assistance and care within the state both by the state itself and by the local governmental units, in accordance with law;"

"§ 101. Liability of relatives to support

"1. The spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person, provided that a parent shall be responsible only for the support of a minor child. Step-parents shall in like manner be responsible for the support of minor step-children."

"§ 131-a. Monthly grants and allowances of public assistance

"1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall, in accordance with the provisions of this section and regulations of the department, provide home relief, veteran assistance, old age assistance, assistance to blind, aid to the disabled and aid to dependent children, to needy persons who constitute or are members of a family household, who are determined to be eligible in accordance with standards of need established in subdivision two. Provision for such persons, for all items of need, less any available income or resources which are not required to be disregarded by other provisions of this chapter, shall be made in accordance with this section. * * *"

"§ 349. Eligibility

* * *

"C. In making such allowances [Aid to Dependent Children] consideration shall be given to the ability of the relative making application and of any other relatives to support and care for or to contribute to the support and care of such child or minor. In making all such allowances it shall be made certain that the religious faith of the child or minor shall be preserved and protected."

"§ 350-j

1. Any inconsistent provisions of this chapter or of any other law notwithstanding, so long as federal aid is available therefor, a social services district shall provide emergency assistance as herein defined to persons eligible, including migrant workers with families.

2. The term 'emergency assistance' means aid, care and services furnished for a period not in excess of thirty days in any twelve month period, in the case of a needy child under the age of twenty-one who is living with a person related to him by blood, marriage or adoption who is eligible to receive aid to dependent children on his behalf pursuant to this chapter and regulations of the department.

3. Emergency assistance to needy families with children shall be provided in accordance with the regulations of the department for children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution of such need did not arise because such children or relatives refused without good cause to accept employment or training for employment.

4. Such department regulations may make provision for aid to be provided under this section in appropriate cases, when grants for aid to dependent children have been discontinued and fair hearings have been requested."

RULES AND REGULATIONS OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

18 NYCRR

"§ 351.2 Aspects of eligibility.

• • •

"(c) *Resources.* Resources include individual or family financial assets, income from employment, eligibility for or receipt of benefits, and the services and social resources available through family relationships and community programs. Resources shall be explored, verified, and evaluated as to their immediate and/or potential availability to remove or reduce the need for public assistance. With few exceptions, the same types of resources may be either immediately or potentially available.

"(1) *Financial resources.* (i) Each financial asset or resource immediately or potentially available to the applicant or recipient shall be identified and shall be explored to determine its nature, amount, form and availability. Each such resource shall be evaluated and a decision reached in regard to its utilization.

"(ii) Such resources include but are not limited to: employability, wages or income from employment, unemployment insurance, workmen's compensation, disability benefits, old age and survivor's insurance, railroad benefits, health insurance, other benefits and pensions, small business, real and personal property, stocks, bonds and notes, mortgages, bank accounts, insurance, trust funds, awards, judgments, estate settlements, veterans' benefits and compensation and pensions, servicemen's allotments and allowances, fraternal benefits, income in kind, contributions from relatives and friends, support orders and any other interest in real or personal property."

"§ 352.14 Contributions from relatives. (a) The ability of the spouse of a recipient or the parent or step-parent of a dependent minor to support shall be determined. • • •

"(b) The immediate or potential availability of new, increased or continuing contributions from other relatives shall be explored and determined."

"§ 352.30 Persons included in the budget.

• •

"(b) The household of a pregnant woman shall be considered as increased by one person from the fourth month of the pregnancy which has been medically verified."

"§ 352.31 Estimate of need and application of income. (a) *For applicant or recipient.*

"(1) The estimate of need for any applicant or recipient shall include all items of need as specified in these regulations for persons in the circumstances under which such items are allowed. The amount to be included for each item of need shall be the appropriate amount provided in accordance with the schedules and other provisions and regulations. To the extent that an item offered is otherwise provided it shall not be included in the estimate of need, but the manner in which such item is provided shall be recorded."

"§ 360.5 Determination of net available income and utilization of any excess. [Additional statutory authority: Social Services Law, §§ 363-a, 364, 365-a, 365-b]

• • •

"(g) In determining the net available income of a family household in which there is a pregnant woman, such family household shall be considered as increased by one person from the fourth month of pregnancy which has been medically verified."

"§ 369.2 Determination of initial eligibility. [Additional statutory authority: Social Services Law, § 355] Eligibility for ADC shall be determined for each applicant in accordance with the policies and procedures generally applicable in public assistance. This determination shall include consideration of each of the following factors of eligibility: financial need, age, welfare of child or minor, residence within the State, living arrangements, relationship of child to relative, and deprivation of parental support or care. Where there is emergent need and a presumption of categorical eligibility the preinvestigation grant procedure shall be followed."

"§ 372.2 Eligibility. (a) Emergency assistance shall be provided immediately by a social services district to or on behalf of a needy child under the age of 21 and any other member of the household in which he is living if:

• • •

"(2) Such child is without resources immediately accessible to meet his needs;

"(3) The emergency assistance is necessary to avoid destitution of such child or to provide living arrangements for him in a home;"

Federal Statute:

United States Code: 42 U.S.C. 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a)(10) "provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;"

Statement of the Case

Bernice Boines, a 20-year old, unmarried woman, after learning that she was pregnant, applied to the Department of Social Services of Monroe County, New York, for an ADC (Aid to Dependent Children) grant for the benefit of her unborn child. The Regulations of the New York State Department of Social Services (18 NYCRR 352.30) provide that "(b) The household of a pregnant woman shall be considered as increased by one person from the fourth month of the pregnancy which has been medically verified." The Regulations also provide that "[t]o the extent that an item offered is otherwise provided it shall not be included in the estimate of need * * *." (18 NYCRR 352.31[a][1]). Therefore, since Miss Boines was living with her mother and her stepfather, who were, under New York statutes, legally responsible for her support (New York Social Services Law, § 101) and who were providing her with full support, the County agency, on or about January 12, 1972

denied her application on the ground that she had relatives legally responsible for her support.

Miss Boines appealed from that determination and a fair hearing was held by the State Department of Social Services. The State Commissioner (predecessor to Petitioner Lavine) found that the girl's parents were able to and were supporting her and that "* * * until birth, the child has no needs which can be met by a grant of assistance" and, on March 13, 1972, affirmed the determination of the local agency.

Thereafter, on May 25, 1972, by Notice of Petition and Petition, respondent, through her mother, instituted a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules in the New York Supreme Court, Special Term, Monroe County, for a judgment annulling and reversing the decision of the State Commissioner of Social Services.

The Supreme Court, Monroe County (ROSENBAUM, J.) reversed the decision of the State Commissioner of Social Services on the ground that "an unborn child has independent needs which should *in a proper case* be met by a grant of assistance to the mother prior to the birth of the child." (Emphasis added.)

The State Commissioner appealed to the Appellate Division, Fourth Department, and on April 11, 1974, that Court handed down a decision affirming the judgment of the Supreme Court, Monroe County.

The Appellate Division held that Miss Boines "was entitled to an aid for dependent children grant to meet the needs of her unborn infant although she was not a recipient of public assistance." The Court further held that denial of public assistance to the unborn child on account of the mother's situation was arbitrary and "constituted a denial

of equal protection in light of section 602(a)(10) of 42 U.S.C., which requires that 'aid to families with dependent children shall be furnished with reasonable promptness to *all eligible individuals*,' (emphasis supplied)."

Petitioner's motion for permission to appeal to the Court of Appeals was denied without opinion, as noted above (p. 2, *supra*).

How the Federal Question Arose

The petition of respondent herein to the Supreme Court of the State of New York, Special Term, County of Monroe, contained the following allegations:

> "24. The testimony elicited at the fair hearing held February 12, 1972 established that if the applicant already had one child on assistance, or were herself a recipient of public assistance, a pregnancy allowance would be granted.
>
> "25. That said testimony further elicited the information that such a grant is not made in cases of first pregnancies but is made in cases of second or subsequent pregnancies.
>
> "26. That this constitutes a denial of equal protection of the laws with regard to the petitioner and her child in this case, in contravention of the laws and Constitution of the United States."

The Justice at Special Term in his decision did not reach the equal protection question.

The Appellate Division of the State Supreme Court, however, in its decision held that:

> "Respondent's denial of public assistance to the unborn child on account of the mother's situation was arbitrary. Such constituted a denial of equal protection of the law in light of section 602(a)(10) of 42 U.S.C. which provides that 'aid to families with dependent children shall be furnished with reasonable promptness to *all eligible individuals*' (emphasis supplied)."

REASONS FOR GRANTING THE WRIT

I. The New York Appellate Division erroneously held, in effect, that the New York's policy of granting public assistance to pregnant women who lack the resources to provide for any additional needs which might arise by reason of their pregnancy, while denying assistance to pregnant women who have not demonstrated a need for such assistance, constitutes a denial of equal protection under the law.

II. This Court has not previously passed upon the question presented here which, although as yet of concern only to states, such as New York, which include unborn children in their ADC (Aid to Dependent Children) family units, the question will become increasingly important if this court, in litigation pending before it, holds that states are mandated by the Social Security Act to include unborn children in their ADC programs.

I.

The decision of the Appellate Division, Fourth Department, should be reviewed because it erroneously held that the ADC program in New York State is being administered in such a way as to constitute a denial of equal protection with respect to certain pregnant women.

This Court has held consistently that the principle of equal protection is not violated by classifications having a reasonable basis and not founded upon invidious discrimination. *Morey* v. *Doud,* 354 U. S. 457 (1957); *Williamson* v. *Lee Optical of Okla., Inc.,* 348 U. S. 483 (1955); *Snell* v. *Wyman,* 281 F. Supp. 853 (S.D.N.Y. 1968), affd. 393 U. S. 323 (1969); *McGowan* v. *Maryland,* 366 U. S. 420 (1961).

As the Court said in *McGowan* v. *Maryland* (at page 425):

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (Citations omitted.)

The principles applying to statutory discrimination apply equally to administrative regulations and their application. *Moose Lodge* v. *Irvis*, 407 U. S. 163 (1972).

A classification under which a grant of public assistance is made to a pregnant woman without resources to meet any additional needs which may arise as a result of her pregnancy, while denying such assistance to a pregnant woman whose needs are being fully met by legally responsible relatives, is not unreasonable or invidious.

In *Shea* v. *Vialpando*, ____ U. S. ____; 40 L Ed 2d 120; 94 S Ct ____, decided on April 23, 1974, this Court reiterated its prior rulings that States are given broad discretion in establishing the standard of need and level of benefits in AFDC programs, citing *Jefferson* v. *Hackney*, 406 U. S. 535 (1972); *Rosado* v. *Wyman*, 397 U. S. 397 (1970); *Dandridge* v. *Williams*, 397 U. S. 471 (1970); and *King* v. *Smith*, 392 U. S. 309 (1968).

The Court then continued:

"Under HEW regulations all AFDC plans must specify a statewide standard of need, which is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level. Both eligibility for AFDC assistance and the amount of benefits to

be granted an individual applicant are based on a comparison of the State's standard of need with the income and *resources available to that applicant.* 45 CFR § 233.20 (a) (2) (i)." (Emphasis supplied.)

Patently, public assistance cannot be granted properly unless an applicant demonstrates a need therefor which is not being supplied from any other source.

In New York State, for purposes of determining eligibility for public assistance, the household of a pregnant woman is "considered as increased by one person from the fourth month of the pregnancy which has been medically verified." (18 NYCRR 352.30[b]). However, since eligibility for public assistance requires a showing of need in excess of income and available resources, and since the budget of respondent's household, when deemed increased by one person by reason of respondent's pregnancy showed an excess over the established standard of need, respondent cannot be deemed eligible for public assistance. (The budget worksheet prepared by the Monroe County Department of Social Services is annexed hereto as Appendix E.)

The legal fiction of including an additional person in a pregnant woman's budget for the last six months of her pregnancy is intended to provide for any additional needs which she may have as a result of her pregnancy. These needs, such as food and maternity clothing, are part of her support and must be provided for by her legally responsible relatives so long as they have the means to supply them (Social Services Law, § 101).[1]

[1] Since, in New York, grandparents are not responsible for the support of their grandchildren, in this situation a case would be activated for the child upon its birth. Items required for the infant immediately following birth can be supplied under the State's Emergency Assistance provisions. (New York Social Services Law, § 350-J; Rules and Regulations of the New York State Department of Social Services, 18 NYCRR 372.2[a] [2] and [3]).

As the California Supreme Court recently said:

> "In essence, the additional AFDC grant is really made to the mother, not her unborn child, for the present and future needs arising from pregnancy." (*California Welfare Rights Organization* v. *Brian*, 113 Cal. Rptr. 154, 520 P. 2d 970 [4/16/74].)[2]

This Court never has passed upon the question presented herein, although in the past year or so cases involving the rights of unborn children have proliferated throughout the country. At present, there are pending before this Court three petitions for certiorari involving the issue of whether or not states are required to include unborn children in the programs of Aid to Families with Dependent Children.[3] The issue here goes beyond that question since New York includes unborn children in the households of needy pregnant women or those whose budgets are insufficient to take care of additional needs arising out of pregnancy. However, if this Court grants those petitions and holds that inclusion of unborn children is mandatory in Aid to Families with Dependent Children programs of states, the question involved here will, without doubt, arise in other states of the Union. If the instant petition is granted, and this Court renders its decision on the merits of this case, a huge volume of litigation may be avoided.

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[2] Petition for Certiorari filed on September 13, 1947, *sub. nom. Brian* v. *California Welfare Rights Organization* (Docket No. 74-269).

[3] *Burns* v. *Alcala*, Docket No. 73-1708 (from ruling of CA 8 [Iowa]), *Lukhard* v. *Doe*, Docket No. 73-1763 (from ruling of CA 4 [Virginia]), and *Keller* v. *Mixon*, Docket No. 74-90 (from ruling of CA 5 [Florida]).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted

Dated: September 30, 1974.

Respectfully submitted,

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APPENDIX "A"

Decision of the Appellate Division, Fourth Department

NEW YORK SUPREME COURT

APPELLATE DIVISION—FOURTH DEPARTMENT

In the Matter
of
The Application of BERNICE BOINES by MILDRED GAINES, her mother and Natural Guardian,

Respondent,

vs.

ABE LAVINE, as Commissioner of the New York State Department of Social Services,

Appellant.

Judgment unanimously modified in accordance with memorandum and as modified affirmed, with costs to petitioner. Memorandum: Special Term incorrectly remanded this matter to the Monroe County Department of Social Services for a further hearing with respect to the ability of this unwed and pregnant, 20-year-old applicant's parents to provide support for her unborn child. An unborn child has needs separate and distinct from its mother for which its grandparents (applicant's parents) are not legally responsible (Social Services Law, § 101, subd. 1). This is conceded by the respondent State Commissioner of Social Services. Absent an obligation of support owing by the grandparents for the needs of a minor child or an unborn infant, their

resources and income are irrelevant and should not be the subject of a hearing under subdivision c of section 349 of the Social Services Law. We agree with the conclusion reached by Special Term, however, that this applicant was entitled to an aid for dependent children grant to meet the needs of her unborn infant although she was not a recipient of public assistance. The legislative and departmental regulations recognize that unborn children have needs separate and independent from those of its mother; that they are, therefore, eligible for public assistance and included among those benefited (*Doe* v. *Lukhard*, 363 F. Supp. 823, 829; 18 NYCRR 352.2[b]; 360.5[g]; 369.1[b]; 369.2[a] [1]; 369.2[a] [2] [ii]; 369.2[f] [4] [iv]; 369.3[a]; 369.3[a] [5]). Respondent's denial of public assistance to the unborn child on account of the mother's situation was arbitrary. Such constituted a denial of equal protection of the law in light of title 42 (§ 602, subd. [a], par. [10]) of the United States Code which provides that "aid to families with dependent children shall be furnished with reasonable promptness to *all eligible individuals*" (emphasis supplied). The State's statutes and regulations may not be construed inconsistently with the Federal statute which controls the disbursement of these funds (*Townsend* v. *Swank*, 404 U. S. 282, 286). (Appeal from judgment of Monroe Special Term in article 78 proceeding.) Present—Marsh, *P. J.*, Moule, Cardamone, Mahoney and Del Vecchio, *JJ.* [71 Misc 2d 259.]

APPENDIX "B"

Opinion of the Supreme Court, County of Monroe

STATE OF NEW YORK

SUPREME COURT—COUNTY OF MONROE

In the Matter
of
The Application of BERNICE BOINES, by MILDRED GAINES, her Mother and Natural Guardian, for a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

Petitioner,

vs.

ABE LEVINE, as Commissioner of the New York State Department of Social Services,

Respondent.

Index No. 4604/72.

MEMORANDUM DECISION.

Article 78 proceeding to annul decision denying petitioner's daughter's application for an aid to dependent children grant.

Stephen L. Brown, Esq., William A. Shapiro, Esq., Monroe County Bar Legal Assistance Corp., Rochester, New York, Attorneys for Petitioner.

Hon. Louis J. Lefkowitz, Attorney General, Ronald M. Singer, Assistant Attorney General, Rochester, New York, Attorney for Respondent.

Appendix "B"—Opinion of the Supreme Court, County of Monroe

RICHARD M. ROSENBAUM, *J.*

Petitioner's daughter upon learning of her pregnancy applied to the Monroe County Department of Social Services for an ADC grant for the benefit of the unborn child. At the time she was a 20 year old unmarried minor living at home with her mother and step-father. Both parents were gainfully employed earning a total gross salary of approximately $1,220.00 a month. The applicant was unemployed although she had been gainfully employed in the past. The record indicates that petitioner was providing assistance to her daughter from her own income. The Monroe County Department of Social Services denied the application on the ground that total financial responsibility of a pregnant minor belongs to the parents of the minor under Social Welfare Law, § 101, and a case cannot be activated solely for an unborn child when the mother is not on assistance. An appeal was taken to the New York State Department of Social Services. A fair hearing was held and the decision was affirmed on the grounds that until birth the child has no needs which can be met by a grant of assistance. The argument for reversal is that the unborn child has needs separate and distinct from the mother and the support received from petitioner was not sufficient to cover those needs. Petitioner further argues that in any event grandparents are not legally responsible to support their grandchildren. Therefore, argues petitioner, the decision to deny assistance was based on an error of law and was arbitrary and capricious.

The Court agrees with petitioner's contention that an unborn child has independent needs which should in a proper case be met by a grant of assistance to the mother prior

to the birth of the child. The rules and regulations enacted pursuant to the Social Welfare Law of the State of New York clearly permit a pregnancy allowance to be allotted at any time after the fourth month of pregnancy.

18 N.Y.C.R.R., §§ 352.30(b), 360.5(g), 369.1, 369.2(a) (1), 369.2(a)(2)(ii), 369.2(f)(4), 369.3(a), 369.3(a)(5).

Petitioner's moving papers and the Court's own examination of the pertinent federal law (U.S. Code, tit. 42, §§ 601-609) satisfy the Court that the State program is consistent with and meets the requirements of the Federal program for assistance to dependent children. Obviously there are many items which must be available for a new born child immediately upon its arrival home from the hospital. These items take time to acquire and therefore it would be impractical and in many cases impossible to make the mother wait until the child is born to apply for this assistance. Where the mother's income is enough to cover her own needs but not the unborn child's needs, the mother may apply for the pregnancy allowance.

18 N.Y.C.R.R., § 369.2(a)(2)(ii).

In all cases involving pregnancy, the mother is considered the grantee and the unborn child the dependent child.

18 N.Y.C.R.R. § 369.3(a)(5).

Since the Court has decided that the unborn child is the one actually in need, it follows that the grandparents are not legally responsible under the law for its needs. An error of law has been made which requires reversal.

Appendix "B"—Opinion of the Supreme Court, County of Monroe

Whether the fact that the applicants are relatives with the ability to contribute to the support and care of the dependent child pursuant to Social Services Law, § 349(c) can be cited as a controlling factor in denying assistance is left open. This case is remanded to the Monroe County Department of Social Services for a determination on that question.

The implication by the Monroe County Department of Social Services that only a mother already on assistance could receive a pregnancy allowance was not made a ground for affirmance in the decision of the State Department of Social Services. Nevertheless, to eliminate confusion this Court does not read the Codes, Rules and Regulations of the State of New York to carry such a restriction. Even if such implication could be made, it fails to conform with Federal regulations which clearly do not sanction such a distinction. The sole question left for the Monroe County Department of Social Services to determine on this remand is whether or not Social Services Law § 349(c) would cause the applicant to be ineligible for assistance.

Subit Order.

Dated: September 12th, 1972.

s/ RICHARD M. ROSENBAUM
Justice of the Supreme Court

APPENDIX "C"

Decision after Fair Hearing by the State Department of Social Services

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

In the Matter
of
The Appeal of BERNICE BOINES from a determination by the Monroe County Department of Social Services (hereinafter called the agency).

A fair hearing was held at Rochester, New York, on February 18, 1972, before Richard Wozniak, Hearing Officer, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the denial of an application for aid to dependent children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant, who is 20 years of age and pregnant, applied for aid to dependent children on January 7, 1972. Appellant resides with her mother and step-father. On January 12, 1972, the agency denied the application because appellant's parents are responsible for her support and the unborn child has no present needs.

(2) Appellant's parents are able to, and are, supporting appellant.

Appendix "C"—Decision after Fair Hearing by the State Department of Social Services

Section 101 of the Social Services Law provides that parents, including step-parents are responsible for the support of minor children, if of sufficient ability. Since appellant's mother and step-father are clearly able to and are, in fact, supporting her, the agency properly denied her assistance.

With regard to the unborn child, appellant contends that such child is eligible since the pregnancy has been verified and her mother and step-father are not responsible for the child. However, until birth, the child has no needs which can be met by a grant of assistance. Upon birth of the child, the appellant may apply for assistance on behalf of the child, if need exists.

Decision: The determination of the agency is affrmed.

Dated: Albany, New York, March 13, 1972.

/s/ GEORGE K. WYMAN,
Commissioner

APPENDIX "D"

Order of the Appellate Division, Fourth Department

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STATE OF NEW YORK

SUPREME COURT

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

Present: Marsh, *P.J.*,
Moule,
Cardamone,
Mahoney,
Del Vecchio,
JJ.

In the Matter
of
The Application of BERNICE BOINES by MILDRED GAINES, her mother and natural guardian,
Respondent

vs

ABE LAVINE, as Commissioner of the New York State Department of Social Services,
Appellant.

The above named Abe Lavine, as Commissioner of the New York State Department of Social Services, respondent in this proceeding, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Monroe, on the 13th day of October,

Appendix "D"—Order of the Appellate Division, Fourth Department

1972, and said appeal having been argued by Mrs. Eileen A. Sullivan of counsel for the appellant, and by Mr. Steven L. Brown of counsel for the respondent, and due deliberation having been had thereon

It is hereby ORDERED That the judgment so appealed from be, and the same hereby is unanimously modified by striking therefrom the second decretal paragraph thereof, and as so modified the judgment is hereby affirmed, with costs to petitioner.

Memorandum, which is hereby made a part hereof.

Enter

LESTER A. FANNING

Entered: April 11, 1974.
Lester A. Fanning,
Clerk.

Appendix "D"—Order of the Appellate Division, Fourth Department

Notice of Entry

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y.

I, LESTER A. FANNING, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 11th day of Apr. 1974

(SEAL)

LESTER A. FANNING,
Clerk.

APPENDIX "E"
Budget Worksheet of the State Department of Social Services.

BUDGET WORKSHEET

Bernice Baines | ADC | 244335 | 1

State of New York — Department of Social Services

Thomas & Mildred Gaines | SS | | E

LIVING ARRANGEMENTS

SHELTER: ☑ Own Home ☐ Rent (Includes) ☐ Rent

No. Persons in Household: 6 ☐ Restaurant Allowance ☐ Other Arrangements (Specify)

FUEL: PERIOD (Specify)

SECTION A. NEEDS

Item of Need	Allowance	Program	
		T-F	
1. Allowance			291.42
2. AABD Allowance 5A 25/10 09			
3. Shelter *		—	125.00
4. Fuel for heating		—	16.60
5. Restaurant Allowance			
6. Room and board			
7. Training			
8. SUB TOTAL By Program			437.02
PURCHASE REQUIREMENTS			
9. Homemaker			
10. Housekeeper service			
11. Child care			
12. Other (specify)			
13. Other (specify)			
14. TOTAL NEEDS (sum of items 8 thru 13)			437.02

SECTION B. INCOME

1. Net Applicable Income (Section D, Item 7)		271.02 / 325.00
2. Other Income (Section E)		675.00
3. TOTAL INCOME (Item 1 plus 2)		1,001.02

SECTION C. SURPLUS/DEFICIT AND GRANT

1. Surplus			563.98
2. Deficit			
3. Other non-cash grant (Explain in "Remarks")			
4. Met by cash grant			

Period of Cash Grant

Caseworker's Signature: W. [illegible] | Date Signed: 1/21/72

SECTION D. EARNED INCOME

Explanation	Work Information T.G	M.G
1. Gross monthly income	853.00	390.00
2. Exemptions *		
3. Non-personal work expenses (union dues, tools, uniforms, etc.)		
4. Personal work expenses a. Federal income tax	79.98	4.00
b. State income tax	14.30	—
c. Social security tax	44.21	20.02
d. NYS disability insurance		
e. Transportation	17.00	17.00
f. Lunch	22.00	23.00
g. Other (specify)		
h. Other (specify)		
i. Other (specify)		
5. Special work expenses		
6. Total deductions (Add Lines 2 thru 5)	177.49	63.98
7. NET APPLICABLE INCOME (1 minus 6)	675.00	326.02

SECTION E. OTHER INCOME

Person's Name	Nature of Income	Amount *	Distribution by Program		
TOTAL OTHER INCOME					

REMARKS

Bernice Baines & unborn child are ineligible because of income of parents making them responsible.

* INSTRUCTIONS ON REVERSE